

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 WILBERT E. BENNETT
Supervising Deputy Attorney General
3 DIANN SOKOLOFF, State Bar No. 161082
Deputy Attorney General
4 California Department of Justice
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2212
Facsimile: (510) 622-2270

7 Attorneys for Complainant

8
9 **BEFORE THE**
CALIFORNIA BOARD OF ACCOUNTANCY
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

12 RICHARD P. ROSENTHAL
13 3 Chestnut Ridge Road
14 Motvale, NJ 07645

15 Certified Public Accountant Certificate No. CPA 69113

16
17 Respondent.

Case No. AC-2009-17

OAH No.

**DEFAULT DECISION
AND ORDER**

[Gov. Code, §11520]

18 **FINDINGS OF FACT**

19 1. On or about December 26, 2008, Complainant Patti Bowers, in her official
20 capacity as the Executive Officer of the California Board of Accountancy, Department of
21 Consumer Affairs, filed Accusation No. A-2009-17 against Richard P. Rosenthal (Respondent)
22 before the California Board of Accountancy.

23 2. On or about May 12, 1995, the California Board of Accountancy (Board)
24 issued Certified Public Accountant Certificate No. CPA 69113 to Respondent. The Certified
25 Public Accountant Certificate was in full force and effect at all times relevant to the charges
26 brought herein and expired on March 1, 2006, and has not been renewed.

27 3. On or about January 6, 2009, Ryan M. Mallard, an employee of the
28 Department of Justice, served by Certified and First Class Mail a copy of Accusation

1 No. AC-2009-17, Statement to Respondent, Notice of Defense, Request for Discovery, and
2 Government Code sections 11507.5, 11507.6, and 11507.7 to Respondent's address of record
3 with the Board, which was and is 3 Chestnut Ridge Road, Motvale, New Jersey, 07645. A copy
4 of the Accusation is attached as Exhibit A, and is incorporated herein by reference.

5 4. Service of the Accusation was effective as a matter of law under the
6 provisions of Government Code section 11505, subdivision (c).

7 5. Government Code section 11506 states, in pertinent part:

8 "(c) The respondent shall be entitled to a hearing on the merits if the respondent
9 files a notice of defense, and the notice shall be deemed a specific denial of all parts of the
10 accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of
11 respondent's right to a hearing, but the agency, in its discretion, may nevertheless grant a
12 hearing."

13 6. Respondent failed to file a Notice of Defense within 15 days after service
14 upon him of the Accusation, and therefore waived his right to a hearing on the merits of
15 Accusation No. A-2009-17.

16 7. California Government Code section 11520 states, in pertinent part:

17 "(a) If the respondent either fails to file a notice of defense or to appear at the hearing, the
18 agency may take action based upon the respondent's express admissions or upon other evidence
19 and affidavits may be used as evidence without any notice to respondent."

20 8. Pursuant to its authority under Government Code section 11520, the Board
21 finds Respondent is in default. The Board will take action without further hearing and, based on
22 the evidence before it, finds that the allegations in Accusation No. A-2009-17 are true.

23 9. The total costs of investigation and enforcement in connection with the
24 Accusation are \$16,762.75 as of February 3, 2009.

25 DETERMINATION OF ISSUES

26 1. Based on the foregoing findings of fact, Respondent Richard P. Rosenthal
27 has subjected his Certified Public Accountant Certificate No. CPA 69113 to discipline.

28 2. Service of Accusation No. A-2009-17 and related documents was proper

1 and in accordance with the law.

2 3. The agency has jurisdiction to adjudicate this case by default.

3 4. The California Board of Accountancy is authorized to revoke Respondent's
4 Certified Public Accountant Certificate based upon the commission of fraud, dishonesty, and
5 gross negligence in the practice of public accountancy (Business and Professions Code [B&P]
6 section 5100(c), failure to observe professional standards in performance of tax engagements
7 (Board Rule 58 and B&P section 5100(g)), conspiracy with unlicensed persons to violate the
8 Accountancy Act (B&P sections 125 and 5100), and filing a false income tax return and
9 knowingly preparing and disseminating false and fraudulent financial information (B&P sections
10 5100(i) and 5100(j), as alleged in the Accusation.

11 **ORDER**

12 IT IS SO ORDERED that Certified Public Accountant Certificate No. CPA
13 69113, heretofore issued to Respondent, RICHARD P. ROSENTHAL, is revoked.

14 Pursuant to Government Code section 11520, subdivision (c), Respondent may
15 serve a written motion requesting that the Decision be vacated and stating the grounds relied on
16 within seven (7) days after service of the Decision on Respondent. The agency in its discretion
17 may vacate the Decision and grant a hearing on a showing of good cause, as defined in the
18 statute.

19 This Decision shall become effective on _____.

20 It is so ORDERED _____.

21
22 **FOR THE CALIFORNIA BOARD OF ACCOUNTANCY**
23 **DEPARTMENT OF CONSUMER AFFAIRS**
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Exhibit A
(Accusation No. A-2009-17)

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 WILBERT E. BENNETT
Supervising Deputy Attorney General
3 DIANN SOKOLOFF, State Bar No. 161082.
Deputy Attorney General
4 1515 Clay Street, 20th Floor
P.O. Box 70550
5 Oakland, CA 94612-0550
Telephone: (510) 622-2212
6 Facsimile: (510) 622-2270

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8 **BEFORE THE**
CALIFORNIA BOARD OF ACCOUNTANCY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. AC-2009-17

12 RICHARD P. ROSENTHAL
3 Chestnut Ridge Road
Motvale, NJ 07645

A C C U S A T I O N

13 Certified Public Accountant No. 69113

14 Respondent.

15
16 Complainant alleges:

17 **PARTIES**

18 1. Patti Bowers (Complainant) brings this Accusation solely in her official capacity
19 as the Executive Officer of the California Board of Accountancy, Department of Consumer
20 Affairs.

21 2. On or about May 12, 1995, the California Board of Accountancy issued Certified
22 Public Accountant Number 69113 to Richard P. Rosenthal (Respondent). This certificate
23 expired on March 1, 2006.

24 **JURISDICTION**

25 3. This Accusation is brought before the California Board of Accountancy (Board),
26 Department of Consumer Affairs, under the authority of Section 5100 of the Business and
27 Professions Code, which provides, in relevant part, that, after notice and hearing, the Board may
28 revoke, suspend or refuse to renew any permit or certificate granted for unprofessional conduct

1 which includes, but is not limited to, one or any combination of the causes specified therein,
2 including willful violations of the Accountancy Act and willful violations of rules and
3 regulations promulgated by the Board.

4 4. Business and Professions Code¹ Sections 118(b) and 5109 provide in pertinent
5 part that the suspension, expiration, cancellation, or forfeiture of a license issued by the Board
6 shall not deprive the Board of its authority to investigate, or to institute or continue a disciplinary
7 proceeding against a licensee upon any ground provided by law, or to enter an order suspending
8 or revoking the license or otherwise taking disciplinary action against the licensee on any such
9 ground.

10 STATUTORY AND REGULATORY PROVISIONS

11 5. Section 5100 states:

12 "After notice and hearing the board may revoke, suspend, or refuse to renew any
13 permit or certificate granted under Article 4 (commencing with Section 5070) and Article 5
14 (commencing with Section 5080), or may censure the holder of that permit or certificate for
15 unprofessional conduct that includes, but is not limited to, one or any combination of the
16 following causes:

17 ...

18 "(c) Dishonesty, fraud, gross negligence, or repeated negligent acts committed in
19 the same or different engagements, for the same or different clients, or any combination of
20 engagements or clients, each resulting in a violation of applicable professional standards that
21 indicate a lack of competency in the practice of public accountancy or in the performance of the
22 bookkeeping operations described in Section 5052.

23 ...

24 "(g) Willful violation of this chapter or any rule or regulation promulgated by the
25 board under the authority granted under this chapter.

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28 1. All statutory references are to the Business and Professions Code unless otherwise indicated.

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"(i) Fiscal dishonesty or breach of fiduciary responsibility of any kind.

"(j) Knowing preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information."

6. Licensees are required by Board Rule 5 to comply with all Board rules, including Board Rule 58, which provides that licensees engaged in the practice of public accountancy shall comply with all applicable professional standards.

7. Business and Professions Code section 125 provides, in pertinent part, that any licensee is guilty of a misdemeanor and subject to the disciplinary provisions of this code applicable to him, who conspires with a non-licensee to violate any provision of this code.

APPLICABLE PROFESSIONAL STANDARDS

8. Professional standards or standards of practice pertinent² to this Accusation include, without limitation:

A. Title 31, Part 10 of Internal Revenue Service (IRS) Regulations (31 CFR 10)³ including:

(1.) Section 10.21 Knowledge of Client's Omission. Section 10.21 provides that:

"[a] practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission."

(2.) Section 10.22 Diligence as to Accuracy. Section 10.22(a) provides that, in general, a practitioner must exercise due diligence:

2. All references herein to standards and other authoritative literature are to the versions in effect at the time the tax shelters were being developed, marketed or sold.

3. 31 CFR 10 is also referred to as "Circular 230" or Section 10 of the IRS Regulations. Among other things, Circular 230 governs practice by CPAs before the IRS.

1 "(1) In preparing or assisting in the preparation of, approving, and filing tax
2 returns, documents, affidavits, and other papers relating to Internal Revenue
3 Service matters;

4 (2) In determining the correctness of oral or written
5 representations made by the practitioner to the Department of the Treasury; and

6 (3) In determining the correctness of oral or written representations made by the
7 practitioner to clients with reference to any matter administered by the Internal
8 Revenue Service."

9 (3.) Section 10.34 Standards for Advising with Respect to Tax Return
10 Positions and for Preparing or Signing Returns. Section 10.34(a) provides that a practitioner
11 may not sign a tax return as a preparer if the practitioner determines that the tax return contains a
12 position that does not have a realistic possibility of being sustained on its merits (the "realistic
13 possibility standard") unless the position is not frivolous and is adequately disclosed to the
14 Internal Revenue Service.

15 B. American Institute of Certified Public Accountants (AICPA) *Code of*
16 *Professional Conduct*, which includes Section I - Principles and Section II - Rules. Both the
17 Principles (Articles III and VI) and the Rules are relevant to the allegations herein. For example,
18 Rule 102 (Integrity and Objectivity), provides that:

19 "In the performance of any professional service, a member shall maintain
20 objectivity and integrity, shall be free of conflicts of interest, and shall not
21 knowingly misrepresent facts or subordinate his or her judgment to others."

22 C. AICPA *Statements on Standards for Tax Services*⁴, including:

23 (1.) TS Section 100 - Tax Return Positions.

24 (2.) TS Section 600 - Knowledge of Error: Return Preparation.

25 (3.) TS Section 800 - Form and Content of Advice to Tax Payers.

26 D. The Internal Revenue Code, including:

27 (1) 26 U.S.C. §6111 ("Section 6111), which governs the registration of tax
28 shelters.

4. The AICPA *Statements on Standards for Tax Services*, are codified as "TS" with section numbers, e.g., TS Section 100.

1 (2) 26 U.S.C. §6112 ("Section 6112), which imposes certain obligations on the
2 organizer or seller of a "potentially abusive tax shelter."

3 (3) 26 U.S.C. §6662 ("Section 6662"), which imposes significant penalties on
4 taxpayers for the understatement of income tax, for example, where the relevant facts affecting
5 an item's tax treatment were not adequately disclosed in the return and where there exists no
6 reasonable basis for the tax treatment, or where there existed no basis for reasonable belief that
7 tax treatment of a shelter was more likely than not the proper treatment.

8 **Cost Recovery**

9 9. Code Section 5107(a) provides in pertinent part that the Executive Officer of the
10 Board may request the administrative law judge, as part of the proposed decision in a
11 disciplinary proceeding, to direct any holder of a permit or certificate found to have committed a
12 violation or violations of the Accountancy Act to pay to the Board all reasonable costs of
13 investigation and prosecution of the case, including, but not limited to, attorneys' fees incurred
14 prior to the commencement of the hearing. A certified copy of the actual costs, or a good faith
15 estimate of costs signed by the Executive Officer, constitutes prima facie evidence of reasonable
16 costs of investigation and prosecution of the case.

17 **Public Protection**

18 10. Code Section 5000.1 provides as follows: "Protection of the public shall be the
19 highest priority for the California Board of Accountancy in exercising its licensing, regulatory,
20 and disciplinary functions. Whenever the protection of the public is inconsistent with other
21 interests sought to be promoted, the protection of the public shall be paramount."

22 FACTUAL BACKGROUND

23 11. The subject matter of this Accusation is Respondent's participation in the
24 development, promotion, and implementation of certain tax shelter schemes by himself and other
25 KPMG⁵ personnel, including senior partners and members of top management, which assisted

26 _____
27 5. At all times relevant to this Accusation, KPMG was a limited liability partnership
28 headquartered in New York, New York, with more than 90 offices nationwide, of which
several are in California. Among the California KPMG offices during the time period relevant

high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income through the use of unregistered and fraudulent tax shelters.^{6/7/}

12. Respondent was an employee of KPMG LLP⁸ from at least in or about 1987 through in or about 2004, working in the Los Angeles Office. From in or about 1998 through in or about July 2000, Respondent was Area Managing Partner of KPMG's Western Region. In 2000 he was Head of Industry Solutions. From in or about July 2000 through in or about May 2002, Respondent was Vice Chairman-Tax Operations. From in or about 2000 to in or about 2002, Respondent was Head of Operations. From in or about 2001 to in or about 2003, Respondent was Head of Federal Tax. From in or about 2003 through in or about 2004, he was Co-Head of Operations.

13. Board Case No. AC-2006-28, filed against KPMG, incorporated the Statement of

herein were offices in Los Angeles, Woodland Hills, San Diego, San Francisco, and Walnut Creek. KPMG was one of the largest auditing firms in the world, providing audit services to many of the largest corporations in the United States and elsewhere. KPMG also provided tax services to corporate and individual clients, some of whom were very wealthy. These tax services included, but were not limited to, preparing federal and state tax returns, providing tax planning and tax advice, and representing clients, for example, in Internal Revenue Service ("IRS") and Franchise Tax Board ("FTB") audits, and in Tax Court litigation with the IRS.

6. The portion of KPMG's tax practice that specialized in providing tax advice to individuals, including wealthy individuals, was known as Personal Financial Planning, or "PFP." The KPMG group focused on designing, marketing, and implementing tax shelters for individual clients was known at different times as CaTS ("Capital Transaction Strategies"), and IS ("Innovative Strategies").

7. KPMG personnel also formed alliances, operating agreements, and/or joint ventures with outside persons, including former partners, employees, and others. KPMG also worked with law firms/lawyers and with banks in implementing the FLIP, OPIS, BLIPS and SOS tax shelter transactions. Significant activity and coordination regarding the design and implementation of the tax shelters took place by California licensees or on behalf of California taxpayers.

8. KPMG LLP ("KPMG") was, at all times relevant, licensed by the Board and operating several offices in California. KPMG was engaged in providing tax services to corporate and individual clients and providing audit services to corporate, governmental and other clients. The Board's related action against KPMG, Accusation No. AC-2006-28, was resolved effective January 18, 2008. It is further referenced in paragraph 12.

1 Facts attached to the Deferred Prosecution Agreement which KPMG entered with the federal
2 government, in or about August 26, 2005. In resolving Case No. AC-2006-28 with the Board,
3 KPMG admitted and accepted that, as set forth in detail in the Statement of Facts attached to the
4 DPA (which was incorporated into Accusation AC-2006-28),

5 "through the conduct of certain KPMG tax leaders, partners, and
6 employees, during the period from 1996 through 2002, KPMG
7 assisted high net worth individuals to evade individual income
8 taxes on billions of dollars by developing, promoting, and
9 implementing unregistered and fraudulent tax shelters. A number
10 of KPMG tax partners engaged in conduct that was unlawful and
11 fraudulent...". (Accusation, Paragraph 57, quoting DPA.)⁹

12 14. Respondent was a tax partner at KPMG between 1999 and 2002, the period
13 relevant herein. He participated in the above-described scheme, consisting of:

- 14 A. devising, marketing, and implementing fraudulent tax shelters;
- 15 B. preparing and causing to be prepared, and filing and causing to be filed
16 with the IRS false and fraudulent U.S. individual income tax returns containing the fraudulent
17 tax shelter losses; and
- 18 C. fraudulently concealing those shelters from the IRS.

19 **FLIP and OPIS, BLIPS, and SOS Tax Shelters**

20 15. The fraudulent tax shelter transactions which are the subject matter of this
21 Accusation were **FLIP** ("Foreign Leveraged Investment Program"), **OPIS** ("Offshore Portfolio
22 Investment Strategy"), **BLIPS** ("Bond Linked Issue Premium Structure"), **SOS** ("Short Option
23 Strategy") and their variants, described below.¹⁰

24 9. See paragraphs 50-55 of Accusation AC-2006-28 and attachment, and paragraphs 9-11
25 of Stipulation AC-2006-28 for detail.

26 10. During the relevant time period, KPMG personnel, some of its clients, and others
27 involved in these tax shelter transactions prepared, signed and filed tax returns that falsely and
28 fraudulently claimed over \$ 4.2 billion in bogus tax losses generated by FLIP and OPIS
transactions, and \$5.1 billion generated by BLIPS transactions. A significant proportion of the
taxpayers who filed tax returns with KPMG's assistance using the FLIP, OPIS, BLIPS and
SOS tax shelters were California taxpayers. Approximately 29% of the transactions were in
California and approximately 38% of KPMG's fees originated in California.

1 16. Respondent was generally involved in BLIPS, FLIP¹¹, OPIS¹², and SOS
2 transactions. In addition, Respondent performed his own SOS transaction.

3 17. The law in effect from at least in or about August 1997 provided that if a taxpayer
4 claimed a tax benefit that was later disallowed, the IRS could impose substantial penalties,
5 ranging from 20%-40% of the underpayment of tax attributable to the shelter, **unless** the tax
6 benefit was supported by an **independent opinion** relied on by the taxpayer in good faith that
7 the **tax benefit was "more likely than not"** to survive IRS challenge.

8 FLIP and OPIS Shelters

9 18. In all material respects, **FLIP and OPIS** were the same. FLIP and OPIS were
10 generally marketed only to people who had capital gains in excess of \$10 million for FLIP and
11 \$20 million for OPIS.¹³

12 19. Respondent was generally involved in FLIP and OPIS transactions, the number of
13 which is known to Respondent but not to Complainant. Respondent, with the assistance of other
14 KPMG tax personnel and their associates, issued and caused to be issued opinion letters although
15

16 11. FLIP was essentially similar to OPIS. The shelters were designed to generate bogus
17 capital losses in excess of \$20 million through the use of an entity created in the Cayman
18 Islands. The client purportedly entered into an "investment" transaction with the Cayman
19 Islands entity by purchasing a purported warrant or entering into a purported swap. The
20 Cayman Islands entity purportedly made a pre-arranged series of investments, including the
21 purchase, from a bank, of bank stock using money purportedly loaned by the bank, followed by
a repurchase of that stock by the pertinent bank at a prearranged price. The tax shelter
transactions were devised to last for only approximately 16 to approximately 60 days, and the
duration of the shelter was pre-determined.

22 12. OPIS was essentially similar to FLIP, described in the footnote above. KPMG's gross
23 fees from OPIS transactions were at least \$28 million.

24 13. In return for fees totaling approximately 5%-7% of the desired tax loss, including a fee
25 to KPMG equal to approximately 1%-1.25% of the desired tax loss, KPMG, its KPMG tax
26 personnel and their associates implemented and caused to be implemented FLIP and OPIS
27 transactions and generated and caused to be generated false and fraudulent documentation to
28 support the transactions, including but not limited to KPMG opinion letters claiming that the
purported tax losses generated by the shelters were "more likely than not" to withstand
challenge by the IRS. As agreed to, and arranged by, KPMG tax personnel, outside lawyers
also issued "more likely than not" opinion letters in return for fees typically of approximately
\$50,000 per opinion, which opinions tracked, sometimes verbatim, the KPMG opinion letter.

1 he knew, *inter alia*, that tax positions taken were not "more likely than not" to prevail against an
2 IRS challenge if the true facts regarding those transactions were known to the IRS; and that the
3 opinion letters and other documents used to implement FLIP and OPIS were false and fraudulent
4 in a number of ways, including that:

5 a. Money was paid by the FLIP and OPIS clients for an "investment"
6 component of the transactions (a warrant or a swap), whereas in fact that money constituted fees
7 paid to KPMG and other participants, as well as money that was temporarily "parked" in the deal
8 but ultimately returned to the client.

9 b. There was no evidence of a "firm and fixed" plan to complete the steps
10 making up the shelter in a particular manner when, in fact, there was such a plan, and the
11 transactions in fact were designed to be completed, and were completed, in the particular manner
12 designed to generate the tax loss.

13 c. The clients were not "more likely than not" to survive an IRS challenge
14 (based on the "step transaction doctrine").¹⁴

15 BLIPS Shelter

16 20. KPMG and its tax personnel and associates marketed and caused to be marketed,
17 and implemented and caused to be implemented the transactions, and generated and caused to be
18 generated false and fraudulent documentation to support the BLIPS transactions.¹⁵ This activity
19 included, but was not limited to, generating KPMG opinion letters (and opinion letters by law
20 firm(s)) that claimed that the purported tax losses generated by the shelters were more likely than
21 not to withstand challenge by the IRS. All of these opinion letters were almost identical.

23 14. The "step transaction doctrine" is a legal doctrine permitting the IRS to disregard
24 certain transactions having no economic substance or business purpose and the purported tax
effects of those disregarded transactions.

25 15. BLIPS generated at least \$5.1 billion in bogus tax losses. KPMG's gross fees from
26 BLIPS transactions were at least \$53 million. Associated law firms and boutique practices had
27 gross fees of at least \$147 million. The fees totaled approximately 5-7% of the desired tax loss,
28 including a fee to KPMG equal to approximately 1-1.25% of the desired tax loss, a fee to a
"boutique practice" equal to approximately 2.75% of the desired tax loss, and a fee to a law
firm generally equal to approximately \$50,000 per transaction.

1 21. Respondent was the engagement partner on at least one BLIPS transaction. He
2 caused to be issued opinion letters related to this and other BLIPS transactions although he knew
3 or should have known that (i) the tax positions taken were not more likely than not to prevail
4 against an IRS challenge if the true facts regarding those transactions were known to the IRS,
5 and (ii) the opinion letters and other documents used to implement BLIPS were false and
6 fraudulent in a number of ways, including but not limited to the following:

7 a. BLIPS was falsely described as a three-stage, seven-year investment
8 program, when in truth and in fact, all participants were expected to withdraw at the earliest
9 opportunity and within the same tax year in order to obtain their tax losses. BLIPS was falsely
10 described as a "leveraged" investment program, whereas, in fact, the purported loan transactions
11 that were part of BLIPS (and that were the aspect of BLIPS that purported to generate the tax
12 loss) were shams -- no money ever left the bank and none of the banks assigned any capital cost
13 to these purported BLIPS loans.

14 b. The BLIPS opinion letters falsely stated that the client (based on the
15 client's purported "independent review", as well as that of outside "reviewers") "believed there
16 was a reasonable opportunity to earn a reasonable pre-tax profit from the [BLIPS] transactions,"
17 when in truth and in fact, there was no "reasonable likelihood of earning a reasonable pre-tax
18 profit" from BLIPS, and instead the "investment" component of BLIPS was negligible, unrelated
19 to the large sham "loans" that were the key elements of the purported tax benefits of BLIPS, and
20 was simply window dressing for the BLIPS tax shelter fraud.

21 c. The opinion letters and other documents were misleading in that they were
22 drafted to create the false impression that KPMG, its tax personnel, and others associated with
23 the tax shelter scheme were all independent service providers and advisors, when in truth and in
24 fact KPMG personnel and associates jointly developed and marketed the BLIPS shelter.

25 22. At various points during the development of BLIPS, KPMG tax personnel
26 identified various significant defects of BLIPS, including that the description of BLIPS and the
27 factual representations contained in the BLIPS opinion letter and in other documents were false.
28 Nevertheless, in or about 1999, the marketing of BLIPS by the firm was approved. Likewise,

1 the risks of proceeding with implementation of BLIPS in 2000 were discussed. Nevertheless,
2 and despite the obviously fraudulent nature of BLIPS and the warnings conveyed, KPMG tax
3 personnel decided not to refund BLIPS fees and to proceed with the issuance of "more likely
4 than not" opinion letters on all of the 1999 transactions with the intent that BLIPS clients would
5 claim the bogus BLIPS losses on 1999 tax returns. KPMG tax personnel and others, including
6 Respondent, continued to be involved in the implementation of more BLIPS tax shelter
7 transactions in 2000 and, in 2001.

8 SOS Shelters

9 23. SOS¹⁶ opinion letters, and other associated documents, were false and fraudulent
10 in a number of ways well known to KPMG and its associates, including the following:

11 a. They falsely and misleadingly described SOS as an investment, when in
12 truth and in fact, it was a tax shelter designed and marketed to generate tax losses in order to
13 eliminate income taxes for wealthy clients and garner substantial fees and income for KPMG and
14 others.

15 b. They falsely claimed that the client would have entered into the option
16 positions independent of the other steps that made up SOS, when in truth and in fact, the clients
17 would not have entered into those positions absent the anticipated tax losses to be generated.

18 c. They falsely claimed that the option positions were contributed to a
19 partnership or other entity to "diversify" the client's "investment" when in truth and in fact, the
20 contribution was simply a necessary step in the tax shelter, was executed for the purpose of
21 generating the tax loss, and was not executed to "diversify" any "investment."

22 d. They falsely claimed that the offsetting option positions were entered into
23 for "substantial non-tax business reasons," and were contributed to the partnership or other entity
24

25 16. The SOS shelters were referred to by various names, including Short Option Strategy,
26 Spread Option Strategy, Split Option Strategy, SOS, Binary Option, Digital Option, Gain
27 Mitigator, Loss Generator, COINS, BEST, and FX Transaction (hereinafter "SOS"). The SOS
28 shelters generated at least \$1.9 billion in bogus tax losses. KPMG's gross fees from SOS
transactions were at least \$17 million. SOS was marketed and sold from at least in or about
1998 through at least in or about 2002 to at least 165 wealthy individuals.

1 for "substantial non- tax business reasons," when in truth and in fact, the transactions were
2 undertaken in order to generate the bogus tax losses SOS purported to generate and not for any
3 "substantial non-tax business reason."

4 24. Respondent employed this false and fraudulent documentation in order to assist
5 clients in claiming the bogus tax shelter losses on tax returns and in evading taxes. In addition,
6 Respondent performed his own SOS transaction in order to assist himself in claiming bogus tax
7 shelter losses.

8 **Fraudulent Concealment of Tax Shelters**

9 25. In addition to preparing and causing to be prepared false and fraudulent
10 documentation relating to and implementing the shelter transactions, and in addition to preparing
11 and causing to be prepared tax returns that fraudulently incorporated the bogus tax shelter losses,
12 Respondent participated in steps taken to fraudulently conceal from the IRS the fraudulent tax
13 shelters, and/or knew or should have known that the steps would have the effect of concealing
14 the shelters from the IRS. The steps taken included, but were not limited to, the following:

- 15 (1.) not registering the tax shelters with the IRS as required by law;
16 (2.) preparing and causing to be prepared tax returns that fraudulently
17 concealed the bogus losses from the IRS; and
18 (3.) attempting to conceal from the IRS the tax shelter losses and transactions
19 with sham attorney-client privilege claims.

20 **Failing to Register Tax Shelters**

21 26. Under the law in effect at all times relevant to this Accusation, an organizer of a
22 tax shelter was required to "register" the shelter by filing a form with the IRS describing the
23 transaction. The IRS in turn would issue a number to the shelter, and all individuals or entities
24 claiming a benefit from the shelter were required to include with their income tax returns a form
25 disclosing that they had participated in a registered tax shelter, and disclosing the assigned
26 registration number. Notwithstanding these legal requirements, KPMG's tax personnel decided
27 not to register the tax shelters based on a "business decision" that to register the shelters would
28 hamper KPMG's ability to sell them. Respondent knew or should have known of the

1 requirement to register the shelters.

2 **Tax Evasion**

3 27. Respondent attempted to conceal his fraudulent tax shelter activities from the IRS
4 by attempting to cloak communications regarding those activities, and certain activities
5 themselves, with the attorney-client privilege by purporting to have tax shelter clients engage a
6 law firm to provide legal advice, with the law firm then purporting to engage KPMG to work
7 under direction of that law firm. Normally, this arrangement would create an attorney-client
8 privilege because the accountant would be working directly under the direction of an attorney.
9 But this particular arrangement was a sham because the clients did not directly engage the law
10 firm, and, in many instances, they never even spoke to anyone at the law firm. The purpose of
11 Respondent's arrangement was to conceal the fraudulent tax shelter from the IRS by enabling all
12 of the work for the shelter to be protected by the attorney-client privilege.

13 28. On at least one occasion Respondent knew of, and approved of, another KPMG
14 tax partner setting up a sham attorney client relationship by purportedly engaging the law firm
15 but claiming that another individual, a former KPMG employee at the time, authored the opinion
16 letter for the KPMG tax partner at the direction of the law firm, when in truth and in fact, the
17 KPMG tax partner authored the opinion letter and was not acting at the direction of the law firm.

18 **FIRST CAUSE FOR DISCIPLINE**

19 **Fraud in the Practice of Public Accountancy** 20 **[Business and Professions Code § 5100(c)]**

21 29. The matters alleged in paragraphs 10 through 27 are re-alleged as though fully set
22 forth.

23 30. Respondent, serving as the engagement partner for, or involved in, a number of
24 tax shelter transactions, among them those listed above, participated in employing various means
25 to conceal from the IRS and other taxing authorities the fraudulent tax shelters. Respondent's
26 license is therefore subject to disciplinary action based on his involvement or acquiescence in:

27 A. The failure of KPMG to register the tax shelters as required;

28 B. The preparation of, or causing to be prepared, false or fraudulent

1 documentation supporting the implementation of the tax shelters; and/or

2 C. The implementation of the tax shelters, including but not limited to
3 preparing and/or causing to be prepared or participating in the preparation and/or filing of tax
4 returns that fraudulently concealed the bogus losses from the IRS.

5 31. Incorporating by reference the matters alleged in paragraphs 26 and 27, cause for
6 discipline of Respondent's license for fraud in the practice of public accountancy is established
7 under Code Section 5100(c).

8 **SECOND CAUSE FOR DISCIPLINE**

9 **Dishonesty in the Practice of Public Accountancy** 10 **[Business and Professions Code § 5100(c)]**

11 32. Complainant realleges paragraphs 10 through 27 above. Incorporating those
12 matters by reference, cause for discipline of Respondent's license for dishonesty in the practice
13 of public accountancy is established under Code Section 5100(c) based upon his dishonest acts,
14 and omissions in the course of his participation, as described above, in the FLIP, BLIP, OPIS,
15 and SOS tax shelters.

16 **THIRD CAUSE FOR DISCIPLINE**

17 **Gross Negligence in the Performance of Tax Engagements** 18 **[Business and Professions Code § 5100(c)]**

19 33. Complainant realleges paragraphs 10 through 27 above. Incorporating those
20 matters by reference, cause for discipline of Respondent's license for gross negligence in the
21 practice of public accountancy is established under Code Section 5100(c) based upon his
22 conduct, which constituted extreme departures from applicable professional standards.

23 **FOURTH CAUSE FOR DISCIPLINE**

24 **Failure to Observe Professional Standards in Performance of Tax Engagements** 25 **[Board Rule 58/Bus. & Prof. Code § 5100(g)]**

26 34. Complainant realleges paragraphs 10 through 27. Incorporating those matters by
27 reference, cause for discipline of Respondent's license is established in that his failure to comply
28 with professional standards applicable to tax engagements constitutes the willful violation of

1 Board Rule 58, providing cause for discipline of his license under Code Section 5100(g).

2 **FIFTH CAUSE FOR DISCIPLINE**

3 **Conspiracy with Unlicensed Person to Violate Accountancy Act**
4 **[Bus. & Prof. Code §125, 5100]**

5 35. Complainant realleges paragraphs 10 through 27. Incorporating those matters by
6 reference, cause for discipline of Respondent's license is established in that he conspired with
7 unlicensed persons, including lawyers and others, to devise, market, and/or implement the
8 fraudulent tax shelters, in violation of Code section 125. The conduct of Respondent, as alleged,
9 constitutes general unprofessional conduct under Code section 5100.

10 **SIXTH CAUSE FOR DISCIPLINE**

11 **Filing False Income Tax Return**
12 **Fiscal Dishonesty - Bus. and Prof. Code Sections 5100(i)**
13 **and**
14 **Knowing Preparation and Dissemination**
15 **of False and Fraudulent Financial Information**
16 **- Bus. and Prof. Code Section 5100(j)**

17 36. Complainant realleges paragraphs 10 through 27, above, and incorporates them
18 herein by reference as if fully set forth at this point. Additional circumstances follow.

19 37. In or about 1999, Respondent conducted a SOS transaction. He used
20 approximately \$248,000 in tax shelter losses from this transaction to evade the payment of 1999
21 income taxes due and owing, and approximately \$248,000 in tax shelter losses from this
22 transaction to evade the payment of his 2000 income taxes due and owing.

23 38. Respondent's conduct as set forth in paragraphs 10 through 27 and 36, above,
24 constitutes fiscal dishonesty, which is unprofessional conduct within the meaning of Code
25 section 5100(i).

26 39. Respondent's conduct in preparing his tax return, as set forth in paragraph 36,
27 above, constitutes the knowing preparation of false and/or fraudulent financial information,
28 which is unprofessional conduct within the meaning of Code section 5100(j).

39. Respondent's conduct in filing his tax return, as set forth in paragraph 36, above,
constitutes the knowing publication or dissemination of false and/or fraudulent financial

1 information, which is unprofessional conduct within the meaning of Code section 5100(j).

2 **PRAYER**

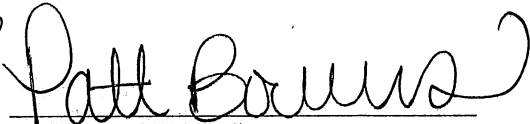
3 WHEREFORE, Complainant requests that a hearing be held on the matters herein
4 alleged, and that following the hearing, the California Board of Accountancy issue a decision:

5 1. Revoking or suspending or otherwise imposing discipline upon Certified
6 Public Accountant Number 61580, issued to Richard P. Rosenthal.

7 2. Ordering Richard P. Rosenthal to pay the California Board of
8 Accountancy the reasonable costs of the investigation and enforcement of this case, pursuant to
9 Business and Professions Code section 5107;

10 3. Taking such other and further action as deemed necessary and proper.

11 DATED: December 26, 2008



12 PATTI BOWERS
13 Executive Officer
14 California Board of Accountancy
15 Department of Consumer Affairs
16 State of California
17 Complainant

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